

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 BILL OGAN,
8 Plaintiff,
9 v.
10 MATTHEW MILHOLLAND and
11 DAVID INCH,
12 Defendants.

NO. CV-06-317-RHW

ORDER OF DISMISSAL

13 By previous order, the Court directed Plaintiff to show cause why the above-
14 captioned matter should not be dismissed for failure to prosecute. A telephonic
15 hearing on this matter was held on February 24, 2010. Plaintiff appeared *pro se*;
16 Defendants were represented by Robert Binger.

17 The Court's previous orders set forth the procedural history of the case,
18 including Plaintiff's numerous failures to comply with Court-ordered deadlines and
19 the numerous continuances the Court has granted upon Plaintiff's motion. When a
20 party fails to comply with a Court order, Fed. R. Civ. P. 37(b)(2) sets forth a
21 number of sanctions available to the Court, including "dismissing the action or
22 proceeding in whole or in part." The Court may also dismiss a matter under Fed. R.
23 Civ. P. 41(b) for failure to prosecute. The Court must consider five factors in
24 determining whether dismissal is appropriate: "(1) the public's interest in
25 expeditious resolution of litigation; (2) the court's need to manage its docket; (3)
26 the risk of prejudice to the defendants; (4) the public policy favoring disposition of
27 cases on their merits; and (5) the availability of less drastic sanctions." *In re
28 Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1226

ORDER OF DISMISSAL * 1

1 (9th Cir. 2006). The Court finds that these factors weigh in favor of dismissal here.

2 First, it is clear that Plaintiff's failures to comply with Court-ordered
3 deadlines have unreasonably delayed the prosecution of this case. The case has
4 been pending for over three years. It has now been over a year since the Court
5 permitted appointed counsel to withdraw, and Plaintiff has taken no substantive
6 action to advance his case during that time. In August 2009, the Court continued
7 the trial for six months, until March 22, 2010, and warned Plaintiff that any failures
8 to comply with the amended Scheduling Order may result in dismissal of the case
9 (Ct. Rec. 133). Plaintiff has since failed to comply with all pretrial deadlines,
10 including filing and serving exhibit and witness lists (February 2, 2010); filing
11 objections to Defendants' witness and exhibit lists (February 9, 2010); filing
12 motions in limine (February 9, 2010); designating deposition testimony (February
13 2, 2010); and filing a joint pretrial order (February 19, 2010). Defense counsel also
14 declares that Plaintiff failed to confer with him regarding the preparation of a joint
15 pretrial order (Ct. Rec. 169).

16 Plaintiff moves the Court to continue his trial date again, this time because
17 he has entered inpatient drug treatment while incarcerated and believes he will
18 have no access to a law library. With great sincerity, the Court applauds Plaintiff's
19 decision to enter treatment and get his life back on track, and the Court wishes
20 Plaintiff nothing but success in those endeavors. However, Plaintiff's participation
21 in a treatment program does not justify his wholesale failure to comply with
22 pretrial deadlines. Indeed, Plaintiff has filed at least eight documents since he
23 entered inpatient treatment (Ct. Recs. 160-65, 167, 170, and 171), none of which
24 identify the basic information (such as witnesses and exhibits) necessary to try this
25 case. At the hearing on this matter, Plaintiff still could not identify any witnesses
26 he planned to call or exhibits he planned to produce. Given the lengthy history of
27 this case and the Court's repeated warnings to Plaintiff in the past, the Court
28 cannot excuse these failures.

1 Second, just as with the first factor, “delay in reaching the merits, whether
2 by way of settlement or adjudication, is costly in money, memory, manageability,
3 and confidence in the process.” *Id.* at 1227. Plaintiff’s unjustified failures to
4 participate have made this case unmanageable and have unreasonably wasted the
5 Court’s resources.

6 Third, prejudice to Defendant is presumed where, as here, a party
7 unreasonably delays the process and fails to produce documents as ordered. *Id.* at
8 1227-28. Late tender of required documents is no excuse. *Id.* Because Plaintiff has
9 not rebutted the presumption of prejudice, this factor weighs conclusively in favor
10 of dismissal.

11 The fourth factor “lends little support to a party whose responsibility it is to
12 move a case toward disposition on the merits but whose conduct impedes progress
13 in that direction.” *Id.* at 1228. By his actions, Plaintiff has unreasonably prevented
14 this case from proceeding to the merits, and therefore he gains little benefit from
15 this factor.

16 Finally, Plaintiff’s failures to comply despite the Court’s warning that such
17 failures would lead to dismissal shows that less drastic alternatives would be
18 ineffective. The Court already explored less drastic sanctions by allowing Plaintiff
19 several continuances in light of his *pro se* status and circumstances. Nonetheless,
20 this case is no closer to trial than it was over a year ago. In the face of Plaintiff’s
21 failure to participate in the process, the Court sees no alternative to dismissal.

22 Accordingly, **IT IS HEREBY ORDERED:**

- 23 1. Plaintiff’s Motion to Continue (Ct. Rec. 162) is **DENIED**.
- 24 2. The above-captioned matter is **dismissed with prejudice**.

25 ///

26 ///

27 ///

28 ///

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, forward copies to counsel and Plaintiff, and **close the file**.

DATED this 1st day of February, 2010.

s/Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

Q:\CIVIL\2006\Ogan\dismiss.ord.wpd

ORDER OF DISMISSAL * 4